ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	
	)	

Reply Comments of Omnipoint Corporation

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SUMMARY

In reply, Omnipoint strongly urges the Commission not to re-classify CMRS operators as LECs. The test for determining when a CMRS operator is a LEC should be based on the same factors as laid out in Section 332(c)(3) of the Communications Act: (1) whether the market, as de-regulated, adequately protects consumers from unreasonable CMRS rates or service conditions, and (2) whether the CMRS operator functions as a substantial substitute for the traditional wireline LEC in the relevant market. This test will provide a reasonable and statute-based measure for transitioning CMRS operators to LEC-like regulatory status when and if that becomes appropriate in the future.

Omnipoint opposes the National Wireless Resellers Association's ("NWRA") position that CMRS operators should be deemed to be LECs today and should be subject to regulation as LECs, especially the resale obligation. Applying LEC regulation to CMRS today is contrary to the express definition of "local exchange carrier" in the 1996 Act and it undermines the purposes of Section 332 of the Communications Act to provide a competitive and deregulated environment for the promotion of new wireless services. PCS, SMR and other CMRS services are only now beginning to reach the market after paying the government billions of dollars for the right to use the spectrum The promise of CMRS was founded, in substantial part, on the government's commitment to allow consumers and the market to decide what services, prices, and features that CMRS operators would build into their systems. To overlay LEC-like regulation at this nascent stage of CMRS development could well smother creative and alternative wireless services

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Omnipoint Corporation, by its attorneys, files this reply to the comments in the above-captioned proceeding.

In its initial comments, Omnipoint focused on four aspects of this docket that are critical to broadband PCS providers. First, broadband PCS operators should not be classified as "local exchange carriers" ("LECs"); the Commission should rely on the preexisting Section 332(c)(3) petition process to determine if a CMRS operator is a LEC. Because some commenters, notably the NWRA, ask that the Commission classify all CMRS operators as LECs, Omnipoint files these reply comments in rebuttal Second, a CMRS operator, as a "telecommunications carrier," is entitled to seek interconnection with the LEC either through its rights under Sections 251, 252 or its rights under Section 332. Omnipoint has expressed this position in its comments in this proceeding, as well as comments and reply comments filed in CC Dkt. No. 95-185, and so it will

not reiterate the arguments here.[1] Third, the Commission should clarify that it is an unreasonable interconnection requirement for any LEC to require all CMRS operators to connect at every tandem in every NPA. Finally, Omnipoint agreed with the Commission's tentative conclusions to adopt strong federal rules which provide consistent national guidelines on interconnection, network unbundling, and collocation.[2]

While Omnipoint continues to believe that its initial four positions are critical for implementation of the local competition provisions, it focuses these short reply comments on the first issue -- classification of a CMRS operator as a LEC.

CMRS Operators Are Not LECs

In response to ¶ 195 of the April 19th Notice of Proposed Rule Making ("NPRM"), Omnipoint explained in its initial comments that the Communications Act exempts CMRS operators from regulatory classification as a local exchange carrier. *See* 47 U.S.C. § 153(26). Further, Omnipoint offered its view that the most appropriate test for determining when, if ever, a CMRS operator should be deemed a LEC is the same test as provided in Section 332(c) of the Act and the Commission's rules for determining when a state may re-regulate CMRS rates.

This single test for any heightened regulation of a CMRS operator is appropriate for several reasons. First, the Section 332 test already measures the factors that would presumably

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1 Based on Omnipoint's review of comments filed by incumbent LECs in this proceeding, arguments that Section 251 governs CMRS-LEC interconnection, to the exclusion of Section 332 interconnection rights, are largely duplicative of arguments already presented in CC Docket No. 95-185. *See, e.g.*, Comments of GTE Service Corp., CC Dkt. No. 96-98, at 54. Those arguments should be decided in the context of CC Docket No. 95-185, as the Commission intended; there is no administrative purpose in adding those issues to the many complicated issues already presented in this docket.

2 Omnipoint is encouraged that commenters from a broad cross-section of the telecommunications industry also share the Commission's view that strong national guidelines and rules are in the public interest. *See, e.g.,* Comments of Northern Telecom at 9-11; Comments of MCI Telecommunications Corp. at 3-6.

dictate the Commission's decision to re-classify a CMRS operator as a LEC: (1) whether the market, as de-regulated, adequately protects consumers from unreasonable CMRS rates or service conditions, and (2) whether the CMRS operator functions as a substantial substitute for the traditional wireline LEC in the relevant market. 47 U.S.C. § 332(c)(3)(i) & (ii). Second, as a matter of statutory interpretation, a single test would harmonize the open-ended language of Section 153(26), enacted by the Telecommunications Act of 1996, P.L. 104-104 ("1996 Act"), with the re-regulation provisions of Section 332(c)(3), enacted by the Omnibus Budget Reconciliation Act of 1993 ("1993 Act"); in contrast, if two separate tests were promulgated, a single CMRS operator may be subject to the untenable outcome that its deregulated status is subject to change under one statutory provision but not the other. Third, as a practical matter, CMRS operators currently face spectrum capacity constraints that limit their ability to displace traditional LEC service in any significant way. Finally, application of the single test simplifies the Commission's task of implementing the 1996 Act because the Commission has already adopted final rules for the Section 332(c) test, at 47 C.F.R. § 20.13, and because that test is grounded in explicit statutory direction.

Many commenters adopted positions generally consistent with Omnipoint's view that a CMRS operator should not be classified as a LEC. *See* Comments of Arch Communications Group, Inc. at 16; Comments of Bell Atlantic NYNEX Mobile, Inc. at 1-5; Comments of Paging Network, Inc. at 12; Comments of Sprint Corporation at 8. As Cox noted, Congress explicitly chose, less than three months ago, to exclude CMRS from the definition of a LEC "and nothing has changed since February 8 to justify modification of this Congressional determination . . . . The appropriate time to re-evaluate whether CMRS should be considered a LEC is when and if CMRS actually becomes a meaningful substitute for traditional local exchange service." Comments of Cox Communications, Inc. at 50-51.

The NWRA, however, argues that the Commission should declare all CMRS operators to be LECs because of "blurring distinctions between wired and wireless technologies" and "the

evolution from single service providers to providers offering one-stop -shopping for all types of services." Comments of NWRA at i. According to NWRA, classifying CMRS as LEC service is consistent with (i) regulatory parity between providers of telephone service (id, at 5-6), (ii) the Commission's treatment of CMRS as a local exchange service (id, at 8-9), and (iii) the statutory definitions of the 1996 Act. Omnipoint finds that these arguments are flatly inconsistent with Congress' regulatory treatment of CMRS in the 1993 and 1996 Acts.

First, the goal of regulatory parity strives to ensure that all *substantially similar* carriers are treated in an equivalent manner; it is not regulatory parity to treat carriers with disparate market advantages and technologies in the same way, as NWRA advocates. *See* Third Report and Order, GN Dkt. No. 93-252, 9 FCC Rcd. 7988, 7996 (1994). For example, with the 1993 Act amendments to Section 332(c), Congress required and the Commission implemented regulatory parity, to the extent feasible, as between all *commercial mobile service providers* so that those providers could compete head-to-head without artificial regulatory impediments.[3] While it was well-aware that these mobile providers would offer local telephony services, Congress did not intend for CMRS to be subject to the same regulatory structure as a traditional landline LEC. In fact, Congress provided the Commission with explicit forbearance authority, which the Commission implemented, to avoid just such a result in order that CMRS could develop in a competitive environment that is lacking in the traditional wireline LEC market. *See* 47 U.S.C. § 332(c)(1)(A) (FCC may forebear from regulating CMRS as Title II common carriers) & § 332(c)(1)(C) (in exercising its forbearance authority, "the Commission shall consider whether the proposed regulation . . . will promote competitive market conditions, including the extent to which such regulation . . . will enhance competition among providers of

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3 Id. at 7997 ¶ 15 (differences between CMRS regulations should be changed if "the differences distort competition by placing unequal regulatory burdens on different classes of CMRS providers").

commercial mobile services"); 47 C.F.R. § 20.15 (FCC rules forebear CMRS operators from certain Title II regulatory requirements); Second Report and Order, GN Dkt. No. 93-252, 9 FCC Rcd. 1411, 1418 (1994) ("Congress acknowledged that neither traditional state regulation, nor conventional regulation under Title II of the Communications Act, may be necessary in all cases to promote competition or protect consumers in the mobile communications marketplace.").

In the 1996 Act, Congress again applied a careful scheme of differential regulatory burdens based on the degree of government oversight necessary to ensure truly a competitive local telecommunications market. In this way, the local competition provisions -- Sections 251 and 252 -- apply three separate levels of regulatory oversight based on each class of carrier's ability to thwart the promise of new competition: Section 251(c) and 252 applies the most rigorous constraints on incumbent LECs, who have traditionally enjoyed a monopoly on local exchange service; fewer requirements are imposed on non-incumbent wireline LECs pursuant to Section 251(b); "telecommunications carriers," such as CMRS operators, are subject to the least regulatory burden pursuant to Section 251(a). Further evidence of Congress' tailoring of regulatory burdens to encourage long-term competition is found in Section 332(c)(8), which forbids the imposition of equal access requirements on CMRS operators, while incumbent LECs remain subject to those same equal access obligations. *See also*, 47 U.S.C. § 271 (RBOCs subject to InterLATA services restrictions, not borne by any other telecommunications carriers). Therefore, NWRA's myopic view that Congress intended for CMRS -- and by implication all providers -- to be treated like LECs reflects a failure to distinguish between Congress' *goal* of services offered by several competing facilities-based providers and the *means* Congress has chosen to achieve that goal through varying levels of regulatory oversight.

Similarly, it does not follow that CMRS operators should be subject to LEC-like regulation simply because CMRS includes services that compete with some services offered by a LEC. Congress purposefully imposed differential regulatory treatment in both the 1996 Act and the 1993 Act in order to promote meaningful facilities-based competition between new entrants

and the traditional wireline monopoly LEC. Without such different levels of regulation, which are primarily designed to prevent the traditional LECs from quashing new entrants, the likelihood of meaningful new competition diminishes. Therefore, NWRA's contention that the Commission should avoid "distinguishing for regulatory purposes between telecommunications carriers on the basis of the technology they use" is inapposite. The Commission, and indeed Congress in the 1993 Act and the 1996 Act, distinguished between CMRS and wireline providers not because CMRS employs new technologies (which have yet to be proven as effective competition to wired fixed services, where 99% of the minutes are today); the regulatory distinctions have been drawn because CMRS providers are new entrants in local telecommunications that, in order to compete with wireline services, must overcome the traditional LECs' market power and other advantages built up over decades of monopoly control over local telecommunications.[4]

NWRA's attempt to argue around the fact that Congress specifically excluded CMRS from the definition of LEC is equally unavailing. Essentially, NWRA claims that because CMRS services may be deemed "telephone exchange service" under 47 U.S.C. § 153(44), Congress meant for all providers of telephone exchange service to be considered LECs. Comments of NWRA at 10-11. There is absolutely no evidence supporting this conclusion, which runs contrary to Congress' express exclusion of CMRS from the definition of LEC, and the careful regulatory distinctions that Congress drew between LECs and "telecommunications

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4 For this same reason, Pacific Telesis' contention that "competition will not develop fairly" because CMRS operators offering fixed wireless services are subject to fewer regulatory restrictions as compared to the traditional wireline LEC misses the point. Comments of Pacific Telesis Group at 81. The differential regulatory treatment reflects the need to prevent wireline LECs from anti-competitive behavior (such as with non-reciprocal compensation in interconnection arrangements) and the public policy in encouraging new alternatives to the traditional wireline LEC.

carriers." For example, compare, 47 U.S.C. § 251(a) (telecommunications carriers obligations), with § 251(b) (LEC obligations), and § 251(c) (incumbent LEC obligations).

Finally, Omnipoint opposes NWRA's position because LEC-like regulation of CMRS at this juncture, including mandatory resale, will only harm emerging PCS and other wireless competitors. In fact, the allocation of PCS licenses is barely half-over, with D, E, and F licenses to be auctioned sometime this year. At this time, it is not known what services the many PCS licensees will introduce, nor is it known how consumers will react or what PCS services will ultimately survive after the initial few years. To change the regulatory baseline for CMRS operators at this time could have significant detrimental effects on business plans and investment.[5] As the Commission noted, the incumbent LEC currently holds "an approximate 99.7 percent share of the local market as measured by revenues," and "wireless systems will require substantial investment before . . . [they are] capable of providing a widespread substitute for wireline telephony services " NPRM at ¶¶ 6, 7. Therefore, it is premature, at best, to assert at this time that CMRS is a LEC-type service, which should be subject to LEC regulation. Moreover, there is very little reason to make such a determination now. Absent over-regulation, competition in the wireless industry will undoubtedly thrive as up to six PCS licensees are possible in each local market. The need to regulate mandatory resale of PCS services in such a highly competitive environment is questionable.[6]

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5 As the Commission noted, "[t]he continued success of the mobile telecommunications industry is significantly linked to the ongoing flow of investment capital into the industry. It is thus essential that our policies promote robust investment in mobile services. . . . [W]e try to promote this goal by ensuring that regulation is perceived by the investment community as a positive factor that creates incentives for investment . . . and by establishing a stable, predictable regulatory environment that facilitates prudent business planning." Second Report and Order, GN Dkt. No. 93-252, 9 FCC Rcd. 1411, 1421 (1994).

6 We note that cellular is already subject to resale obligations, 47 C.F.R. § 22.901(e), which are necessary for PCS customers to be able to obtain national roaming.

NWRA's assertion that small business resellers could benefit from mandatory resale obligations on all CMRS operators[7] overlooks the fact that almost one-half of the broadband PCS licensees (Block C and F) as well as other CMRS operators will themselves be designated small businesses or entrepreneurs. These facilities-based small PCS businesses should not be forced to provide resale on involuntary terms and conditions even before they have had an opportunity to build-out and operate their systems. Small business resellers had and still have the same opportunities as all other small businesses to participate in the entrepreneur's auctions for CMRS, to take on the auction payment obligations and contribute a portion of the value of the spectrum back to the public fisc, and to build-out and compete with other facilities-based providers. Even after the auctions close, small businesses will undoubtedly find partnering opportunities to participate in CMRS with other small businesses.[8] Thus, there is no reason to favor small business resellers to the detriment of facilities-based small business operators that have agreed to pay the government billions for the use of the spectrum. In any event, nothing prevents resellers and licensees from agreeing to resale terms on a voluntary basis without regulatory interference into that arrangement.

For the foregoing reasons, Omnipoint respectfully submits that CMRS operators are not now and should not be re-classified as LECs. Consistent with its obligation to promote

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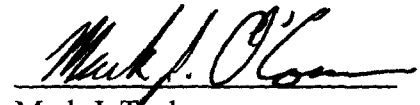
7 Comments of NWRA at 13-15.

8 Moreover, we note that a non-discriminatory resale requirement would undoubtedly force small business licensees to turn over their spectrum to large-company resellers, thus thwarting Congress' objective to increase small business participation in CMRS. 47 U.S.C. § 309(j)(4)(D).

alternative local service competition, the Commission should apply its pre-existing Section 332(c) test for determining if, in the future, a CMRS operator's regulatory status should change.

Respectfully submitted,

OMNIPOINT CORPORATION

By: 

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I hereby certify that a copy of the foregoing Reply Comments of Omnipoint Corporation have this 30th day of May, 1996, been mailed, first class mail, postage prepaid to the following:

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